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INTERESTED PARTIES MEETING

REPORTER'S TRANSCRIPT

DECEMBER 14, 2005

IN RE:

RULES FOR CALIFORNIA TAX ADMINISTRATION AND

APPELLATE REVIEW

PART 5

GENERAL BOARD HEARING PROCEDURES

Reported by: Carole W. Browne, CSR 7351
Laurie Gower, CSR 8000

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1 SACRAMENTO, CALIFORNIA

DECEMBER 14, 2005

2 ---o0o---

3 MS. PELLEGRINI: Good afternoon, everyone. I'm
4 Deborah Pellegrini. I'm just going to get the meeting
5 started, go through the procedures. Most of you were
6 here this morning. We're going to kind of go through
7 the same procedures.

8 Please note we have two hearing reporters. We
9 feel it's very important to get a very accurate
10 transcript, so we're going to start by having everybody
11 go around and introduce yourself and who you represent.
12 And speak slowly so the hearing reporters can get it.

13 We are also requesting that you provide the
14 hearing reporters your business card so we can make sure
15 your name and who you represent is accurate for the
16 transcript. And in addition, we're going to be sending
17 around a sign-in sheet. And it's not to sign your name.
18 It's so that we can read your name. That's very
19 important.

20 We are here this afternoon to do Part 5, which
21 is the general Board hearing procedures. After we
22 finish the introductions, I will be turning it over to
23 Brad and Carole.

24 We are going to first start with the
25 communications . . .

1 MR. HELLER: We're going to start with
2 communications with Board members.

3 MS. PELLEGRINI: With the Board members. We
4 will then be moving to the ex parte communications
5 section. And after we finish those two sections, then
6 Carole will be leading you through, going section by
7 section.

8 When you do speak, the first time you speak,
9 I'm going to ask that you say your first name and last
10 name. You don't have to say who you represent again,
11 because the hearing reporters have that. And then every
12 time you speak thereafter, if you'll just say your first
13 name, the hearing reporters can get it.

14 We also have given the hearing reporters
15 permission to stop the procedures if they either cannot
16 hear you or if there starts to be a lot of
17 cross-talking, because it is important we get an
18 accurate transcript.

19 The only other thing I want to mention is that
20 we're asking that comments be submitted by
21 December the 23rd, and that this is going to be coming
22 before the Board on January the 31st in the afternoon
23 under Chief Counsel matters.

24 Okay. So with that, I will begin the
25 introductions. I'm Debbie Pellegrini, the Chief of

1 Board Proceedings.

2 MS. RUWART: My name is Carole Ruwart. I'm
3 with the Board's Legal Department.

4 MR. HELLER: I'm Bradley Heller. I'm also with
5 the Board's Legal Department.

6 MS. MANDEL: Marcy Jo Mandel, State
7 Controller's Office.

8 MR. VINATIERI: Joe Vinatieri, Bewley,
9 Lassleben & Miller.

10 MR. LANGSTON: Bruce Langston, Franchise Tax
11 Board.

12 MS. BORGMAN: Susan Borgman, Franchise Tax
13 Board.

14 MR. DAVIS: Kenneth Davis, Franchise Tax Board.

15 MR. THOMPSON: Ken Thompson, Valuation
16 Division, Board of Equalization.

17 MS. WAGGENER: Michele Waggener, Price
18 Waterhouse Coopers.

19 MR. KAMP: Steve Kamp, Board member Betty Yee's
20 office.

21 MR. GUS RIVERA: Gus Rivera, Intel Corporation.

22 MR. SPERRING: Jon Sperring, Price Waterhouse
23 Coopers.

24 MR. MICHAELS: Peter Michaels, Cooper, White &
25 Cooper in San Francisco.

1 MR. DAKESSIAN: Marty Dakessian, attorney at
2 law.

3 MS. KENDALL: Ami Kendall, Legal Department.

4 MR. LoFASO: Al LoFaso with Betty Yee's office.

5 MS. SAREM: Sheila Sarem, Legislative Division.

6 MR. FINNEGAN: Patrick Finnegan with the
7 Excise Taxes Division, Board of Equalization.

8 MS. ZIMMERMAN: Sarah Zimmerman, SEIU Local
9 1000.

10 MR. NIELSEN: Richard Nielsen, Pillsbury,
11 Winthrop, Shaw, Pittman, San Francisco.

12 MR. DALY: Charles Daly, Legal Division.

13 MS. MAHONEY: Laura Mahoney, BNA, Daily Tax
14 Report.

15 MR. GILBERT: Arlo Gilbert, Fuel Taxes
16 Division, Board of Equalization.

17 MS. KINKLE: Sherrie Kinkle, Board of
18 Equalization, Property Taxes.

19 MS. OLSON: Diane Olson, Board Proceedings
20 Division.

21 MS. MARTIN: Lisa Martin, California Taxpayers
22 Association.

23 MR. DANOWITZ: Steve Danowitz, Ernst & Young.

24 MS. YEE: Betty Yee, Acting Board Member.

25 MR. FOSTER: Ian Foster, BOE legal.

1 MR. SMITH: Chris Smith, Betty Yee's office.

2 MR. GARY EVANS: Gary Evans, Board Proceedings.

3 MR. HERD: Jim Herd, Acting Board Member Betty
4 Yee's office.

5 MR. YOUNG: Joe Young, Sales and Use Tax
6 Department, Board of Equalization.

7 MS. RUWART: Very good. Who is on the phone
8 with us? Is there anybody on the phone? Okay. No
9 response. Okay. There's currently nobody on the phone.
10 If and when somebody joins us, we'll just briefly stop
11 and ask them to introduce themselves.

12 And someone has just entered the room.

13 MR. SHAH: Neil Shah, representing Mr. Parrish,
14 Board member.

15 MS. RUWART: And a few more. Al, would you
16 introduce yourself?

17 MR. KOCH: Al Koch, MBIA.

18 MR. GOLDBERG: Lenny Goldberg, California Tax
19 Reform Association and State Taxes.

20 MS. RUWART: Joan, could you state your name?

21 MS. ARMENTA-ROBERTS: Joan Armenta-Roberts,
22 KPMG.

23 MR. HELLER: Welcome, everyone. Thank you for
24 joining us this afternoon.

25 As Debbie indicated, we're going to be

1 discussing our proposals for Part 5, which is the
2 Board's general hearing procedures. In general, they're
3 designed to be applicable to all the different programs
4 that the Board administers, although some of the
5 provisions are not applicable to appeals from Franchise
6 Tax Board as to the extent that those -- they're already
7 addressed by provisions in Part 4, which we discussed
8 this morning.

9 And, basically, since we think that probably
10 the two most important proposals or issues in that
11 proposal have to do with communications with Board
12 members and disclosure of taxpayer information, we're
13 planning on starting with those and working on
14 communications with Board members first.

15 I'm going to do a brief introduction before we
16 start taking comments, and then after that we'll go to
17 disclosure of taxpayer information, and then we'll go
18 ahead and just take it from the top in Part 5, starting
19 with the first provision and going from there.

20 We'll go as far as we can. We're hoping to be
21 finished by 4:30 today. If not, hopefully earlier, but
22 we certainly have allotted the time, if necessary.

23 Just moving ahead, basically we have provided a
24 provision, it's number 5015.1, and it basically just
25 provides --

1 MS. RUWART: Which is on page 17, if you have
2 the numbered version that came off the website with the
3 check boxes of the agree/disagree/modify, on or about
4 page 17 at the top, 5015.1. And if anybody needs any
5 copies of the rules or any of the available public
6 comment, you probably saw that they're on the table
7 outside.

8 MR. HELLER: Sorry for moving too quickly. I
9 hope everybody's on page 17 or has a version of 5015.1
10 in front of them.

11 Essentially, it basically provides the Board's
12 current policy, which is that the Board members are
13 available to their constituents, the public, and members
14 of other agencies and other governmental agencies at all
15 times.

16 It also includes a specific direction to
17 attorneys so that they can feel comfortable
18 communicating with the Board in light of an advisory
19 opinion issued by the State Bar in 1984 which
20 tangentially concluded that attorneys might be precluded
21 from communicating with Board members while there's
22 pending controversy, on the idea that they're judicial
23 officers, although the validity and enforcement of that
24 opinion is somewhat in question.

25 Essentially it just contains our current

1 policy, and certainly not in an effort to create some
2 new set of rules. It's just what the Board has
3 historically done with regard to communicating with
4 Board members.

5 We're also putting together a provision that
6 presents our current policy. We did take a look at what
7 is out there legally.

8 Basically we are aware that, you know, there
9 are several different statutes in California law that
10 would prohibit ex parte communications with judicial
11 officers, with administrative law judges, with certain
12 types of Board members, and none of those provisions are
13 specifically applicable to the Board, so basically right
14 now there is no statutory provision.

15 There may be proposals for ones at the
16 legislature, but right now there's no current statute
17 that would prohibit ex parte or communications with
18 Board members at any particular time.

19 Although there is an opinion, as I mentioned,
20 by the State Bar, that's an advisory opinion. It's not
21 binding and it's not actually a Bar rule that prohibits
22 it. So there is some issue as to whether or not
23 attorneys are, in fact, prohibited under the current
24 circumstances at the State Bar.

25 And then there is also one published case out

1 there where a court applied the canons of judicial
2 ethics to an ALJ and basically went along with something
3 similar, basically rejected the State Bar's analysis,
4 came up with an idea that the unwritten common law of
5 California somehow imposed the judicial canons of ethics
6 on administrative law judges.

7 And so we're kind of aware of what's out there
8 in the field, but really we want to get an idea of what
9 we should do, what staff should recommend to the Board,
10 and to get people's opinions on our current policy.

11 To the extent that you have -- you know, you
12 think that there's authority we haven't seen, we're more
13 than happy to hear about that. Basically we're trying
14 to get comments on what we think should be the policy
15 here and why, essentially, those types of comments.

16 And with that I'll go ahead and open it back up
17 to Carole for comments. Once we're finished with that,
18 we'll go ahead to disclosure and I'll do a brief
19 introduction and then we'll go from there.

20 MS. RUWART: Good afternoon, everybody. Thank
21 you for coming.

22 I'll just make some general comments that
23 aren't maybe particularly pertaining to this particular
24 paragraph, but as a general rule we're going to be --
25 there's a general procedure. We are going to be going

1 through all of Part 5, except for these two sets of
2 provisions, start to finish.

3 In doing so, to keep things moving along and to
4 make sure that we spend our time on substantive issues,
5 I would like to just let you know that we have received
6 and appreciate comments in writing. We will gladly
7 accept all grammatical edits, and there's no need to go
8 over them here today.

9 If you do have comments about phrasing that
10 pertains to the substance of what is being intended to
11 be communicated, we are more than happy to clarify what
12 it is we intended and to accept suggestions for
13 different rephrasing of those sections.

14 So that's kind of the general ground rules that
15 we've been operating these other meetings on. It seems
16 to have gone pretty well. So we do appreciate that.

17 The first section we'd like to discuss is
18 section 5015.1, Communications with Board Members. And
19 this paragraph is the only paragraph covering this topic
20 area. So if anybody has any either global comments or
21 specific comments about phrasing, please begin.

22 MR. LANGSTON: I'm Bruce Langston from the
23 Franchise Tax Board Legal Branch.

24 We have provided a memorandum from John Davies,
25 the Chief Counsel of the Franchise Tax Board, which is

1 available on the table outside.

2 Basically, he is urging that any type of
3 ex parte communication between Board members and staff
4 should not be authorized or approved with respect to
5 franchise and income tax matters, and he also proposes
6 an alternative, if it is, to make sure that the
7 Franchise Tax Board staff is included in those.

8 I'm not going to go through it in detail
9 because it's out there and it's available for members of
10 the public. Thank you.

11 MS. RUWART: Appreciate that very much.

12 Mr. Goldberg.

13 MR. GOLDBERG: Yes. Lenny Goldberg. I read
14 the -- had occasion to talk with the FTB and read their
15 document. We very much concur with their perspective.

16 I would say, since this -- and I've been
17 involved at the PUC with these similar issues, and they
18 make a distinction between regulatory and quasi-judicial
19 issues. And I would suggest in section -- in this
20 section 5015.1 that after -- in the first sentence,
21 "statutory duties," it say, "except for adjudicatory
22 matters that come before the Board." And then at that
23 point the question becomes what level of adjudication
24 there is.

25 Now, I've had occasion to discuss this with

1 Board members and would suggest one of the arguments
2 that I've heard consistently for ex parte communications
3 is the fact that there is so little time in a hearing.
4 Now, I know, that's not the subject of this discussion,
5 but it may be in hearing procedures that if there were
6 five days of hearings, if -- insofar as we're being
7 adjudicatory here and acting more like a court, that if
8 there were five days of hearings per month or any
9 extended hearings, rather than the 20-minute time
10 deadlines, that the ability of the taxpayer to make
11 their case fully would be enhanced.

12 So as an alternative to this section, which
13 allows ex parte communications with the Board members
14 when they are acting in an adjudicatory role, that the
15 adjudicatory cases be given more time -- much more
16 extensive time other than the period of time of the
17 month in which they're to be heard.

18 That resolves some of the questions of how do
19 we get the information out when we only have 20 minutes.
20 And I do think that that suggests other procedural
21 changes, obviously, which are not currently in this
22 draft, but is a potential solution to the dilemma that
23 has been expressed to me with regard to how do we get
24 all the information available.

25 So I would suggest, as an alternative, I would

1 also concur with the Franchise Tax Board, as the Public
2 Utilities Commission does, which is to say there be full
3 disclosure.

4 Now one more point, if you don't mind. We have
5 suggested that at the Public Utilities Commission when
6 one member holding an ex parte communication in certain
7 cases is required, to offer that to the other members
8 which would be there for what they call all party
9 meetings. The problem here is that the Franchise Tax
10 Board still holds to its lack of ex parte. But if
11 everybody is in the same place, it is no longer an
12 ex parte communication.

13 MS. MANDEL: Marcy. Just a question. At the
14 PUC then, if they have a majority of the PUC members, do
15 they have to notice that as a Board meeting?

16 MR. GOLDBERG: No, they don't. Each member
17 will meet with all the parties.

18 MS. MANDEL: Oh, the parties in the --

19 MR. GOLDBERG: Yeah. And it really has changed
20 the culture there in terms of ex parte.

21 MS. MANDEL: I didn't understand what you
22 meant.

23 MR. GOLDBERG: And presumably, if there were a
24 requirement that all parties be available, then, as I
25 understand it, that would not be an ex parte

1 communication. It would be a meeting in chambers with
2 the other side. So we would have no objection to that
3 if both parties to a tax dispute were present with the
4 Board member. That does create administrative problems,
5 because you're meeting with five Board members on every
6 case.

7 MS. RUWART: Other comments? Yes.

8 MR. DAKESSIAN: Marty Dakessian. I think
9 Mr. Goldberg hit on it when he said if the Board were
10 acting more like a court. And the fact is, the Board is
11 not a court.

12 I'm going through the legal opinion that I just
13 had an opportunity to review that Mr. Davies produced,
14 and there are a number of problems with this opinion
15 from both a legal and policy perspective.

16 First of all, the reason that we are struggling
17 to come up with these different pieces of authority to
18 justify a ban on ex parte communications is because
19 authority doesn't exist to ban such communications.

20 Any discussion of the State Bar opinion 1984-82
21 should probably be stricken from the record because,
22 first of all, the FTB notes, by its own terms, does not
23 apply to agencies that are not covered under the
24 Administrative Procedures Act, which includes the Board
25 of Equalization.

1 The opinion itself is an advisory opinion and
2 isn't even binding on the parties to whom it's written.
3 And the reasoning of the opinion is suspect. It goes on
4 this notion that seeks to expand this definition of
5 judges -- judicial officers without citing any authority
6 at all. And so I think it's a really tenuous legal
7 argument and should be completely disregarded by the
8 Board.

9 Now, if you look at this from a policy
10 perspective, you have a number of different problems.
11 First of all, as Mr. Goldberg noted, you know, perhaps
12 some people in this room would like to see the Board act
13 more like a court.

14 There are certain interested parties in this
15 room that have tried to change the dynamic of the Board
16 and legislature through the passage of a tax court.
17 That didn't happen. This seems to be a continuation of
18 those efforts. And I don't see any need for changing
19 the provisions in the rules of practice.

20 The point here is that Board of Equalization
21 members are elected officials. And as a lawyer who
22 represents a lot of taxpayers who would not otherwise
23 have access to the system, who might be smaller or
24 medium-sized businesses, it's critical -- absolutely
25 critical to have access to their elected officials.

1 You have a situation now where the Board of
2 Equalization in its property tax hearings and its sales
3 tax hearings can speak with taxpayers of all shapes and
4 sizes, including, you know, many major corporate
5 taxpayers; but, you know, banning ex parte
6 communications in this situation would take away that
7 access from people who would not have it in their income
8 tax appeals before the Board of Equalization.

9 So, you know, in trying to draw this line
10 between when ex parte is appropriate and when it's not
11 is to me, you know, a fruitless exercise. You know,
12 let's look at 25137 petitions at the Franchise Tax
13 Board. Does FTB staff communicate with the FTB Board
14 members during those hearings? What's going on there?

15 I mean, I think access to elected officials is
16 critical, and I support the Board's current draft and
17 oppose any efforts to limit ex parte communications.

18 MS. RUWART: Okay. Thank you. Other comments?
19 Yes.

20 MS. MARTIN: I'm Lisa Martin with the
21 California Taxpayers Association. I just want to make a
22 very general comment, and that is that we have a broad
23 coalition of member companies who have tremendous
24 interest in this issue, and we will be submitting our
25 response by the deadline.

1 MS. RUWART: Thank you. We look forward to
2 getting it in writing. Thank you. Other comments?
3 Yes.

4 MS. ZIMMERMAN: I'm Sarah Zimmerman. We
5 submitted something in writing that there's also
6 legislation that we have been looking at over the course
7 of the past year regarding ex parte communication.

8 We represent about 3,000 auditors and
9 compliance reps. And part of our interest in this comes
10 from, I think, something that Lenny and other people
11 have been referencing, which is a very short time
12 period. Our staff works on some of these audits for a
13 number of years.

14 We're definitely interested both in looking at
15 the rationale for ex parte communications, looking at
16 how ex parte communication is to be permitted, having
17 the provision for the ex parte communication and the
18 subject of the communication be published, but also
19 looking at things like, you know, interested parties
20 meetings, and, depending on the size of the audit, I
21 think one way to look at and address the question of
22 small taxpayers and having access to Board members is
23 also looking at the size of the audit.

24 One of the things that we are recommending
25 looking at is having more of the auditors involved in

1 preparing the hearing as a way to deal with this
2 question of having to address very complicated issues in
3 a very short amount of time and engage the people that
4 have been preparing the audit over a number of years in
5 that process in a more formal way.

6 MS. RUWART: Okay. Other comments?

7 UNIDENTIFIED SPEAKER: You mentioned
8 legislation. What's the status of that legislation?

9 MS. ZIMMERMAN: It's no longer --

10 UNIDENTIFIED SPEAKER: It just died?

11 MS. ZIMMERMAN: The idea was that it makes --
12 that this process was instead of the legislation at that
13 time.

14 MS. RUWART: Are there any other comments?

15 MS. MANDEL: Well, just as somebody who used to
16 spend many, many years with a more conservative law
17 firm, let's just call it this way.

18 MS. RUWART: I'm sorry, hold on one second. Is
19 the phone not working?

20 MS. OLSON: They say it's not working.

21 MS. MANDEL: Do you want to redial them?

22 MS. RUWART: I am so sorry.

23 Hello, this is Carole Ruwart. Can you hear me?

24 MR. HARRIS: We can.

25 MS. RUWART: Okay. I apologize sincerely. We

1 thought you were not with us, but you were, and you were
2 waiting, I guess.

3 MR. HARRIS: We were.

4 MS. RUWART: We have -- we have started the
5 meeting.

6 We have discussed partially Section 5015.1,
7 Communications with Board Members.

8 MR. HARRIS: Okay.

9 MS. RUWART: Perhaps let's start by introducing
10 you on the phone.

11 MR. HARRIS: Bill Harris from Intel Corp.

12 MR. EVERETT: Kirk Everett, Silicon Valley
13 Leadership Group.

14 MR. HARRIS: That's the only -- that's the two
15 of us.

16 MS. RUWART: Oh, and we're the third party.
17 Okay. Sorry.

18 Briefly, I think we should just do an
19 introduction, it will just be brief, around the room
20 because there are some new people from this morning.
21 You all were on this morning.

22 Carole Ruwart with the Legal Department.

23 MR. HELLER: Bradley Heller, Legal Department.

24 MS. ARMENTA-ROBERTS: Joan Armenta-Roberts,
25 KPMG.

1 MS. MANDEL: Marcy Jo Mandel, State
2 Controller's Office.
3 MR. SCHUTZ: Chris Schutz, John Chiang's
4 office.
5 MR. VINATIERI: Joe Vinatieri, Bewley,
6 Lassleben & Miller.
7 MR. LANGSTON: Bruce Langston, Franchise Tax
8 Board.
9 MS. BORGMAN: Susan Borgman, Franchise Tax
10 Board.
11 MR. DAVIS: Ken Davis, Franchise Tax Board.
12 MR. THOMPSON: Ken Thompson, Valuation
13 Division.
14 MS. WAGGENER: Michele Waggener, Price
15 Waterhouse Coopers.
16 MR. KAMP: Steve Kamp, Board member Betty Yee's
17 office.
18 MR. RIVERA: Gus Rivera, Intel.
19 MR. SPERRING: Jon Sperring, Price Waterhouse
20 Coopers.
21 MR. MICHAELS: Peter Michaels, Cooper, White &
22 Cooper.
23 MR. DAKESSIAN: Marty Dakessian, attorney at
24 law.
25 MS. KINDALL: Ami Kindall, Legal Department.

1 MR. LoFASO: Al LoFaso, Board member Betty
2 Yee's Office.

3 MS. SAREM: Sheila Sarem with the legislative
4 division.

5 MR. FINNEGAN: Patrick Finnegan with the Excise
6 Tax Division, and also representing BOE rank and file as
7 labor steward Board of Equalization.

8 MS. ZIMMERMAN: Sarah Zimmerman, policy
9 director of SEIU 1000.

10 MR. NIELSEN: Richard Nielsen, Pillsbury,
11 Winthrop, Shaw, Pittman.

12 MR. DALY: Charles Daly, legal department.

13 MS. MAHONEY: Laura Mahoney, BNA, Daily Tax
14 Report.

15 MR. GOLDBERG: Lenny Goldberg, California Tax
16 Reform Association.

17 MR. GILBERT: Arlo Gilbert, Fuel Taxes
18 Division.

19 MS. KINKLE: Sherrie Kinkle, State Board of
20 Equalization, Property Taxes.

21 MS. OLSON: Diane Olson, Board Proceedings
22 Division.

23 MS. MARTIN: Lisa Martin, California Taxpayers
24 Association.

25 MR. DANOWITZ: Steve Danowitz, Ernst and Young.

1 MR. KOCH: Al Koch, MBIA.

2 MS. YEE: Betty Yee, Acting Board Member.

3 MR. FOSTER: Ian Foster, Board of Equalization,
4 Legal.

5 MR. SMITH: Chris Smith, Board Member Betty
6 Yee's office.

7 MR. EVANS: Gary Evans, Board Proceedings.

8 MR. HERD: Jim Herd, Board member Betty Yee's
9 office.

10 MR. FILLMAN: Don Fillman, Board member Bill
11 Leonard's office.

12 MR. SHAH: Neil Shah, Board member Claude
13 Parrish's office.

14 MR. YOUNG: Joe Young, Sales and Use Tax
15 Department.

16 MS. PELLEGRINI: Deborah Pellegrini, Board
17 Proceedings.

18 MS. RUWART: Thank you for taking the time.

19 We had some comment on 5015.1. There's been no
20 real discussion about phrasing but more about the
21 general concepts. We've heard positions both for and
22 against and Ms. Mandel was about to contribute to the
23 discussion.

24 MS. MANDEL: I was going to give you a
25 conservative viewpoint that we had when I was in

1 practice.

2 At that time there was nothing in the rules and
3 to repeat something I said with this morning's group,
4 the board's function and appeals from the Franchise Tax
5 Board is quasi-judicial function. Lenny, I wouldn't use
6 the word "adjudicatory" because that has very specific
7 meaning under the Kopp Act, and we have had that
8 discussion, you and I, previously.

9 And that for all the other taxes and fees that
10 the Board is administering, it's doing it itself as the
11 administrator. We may euphemistically call them appeals
12 these days, but they really are petitions to the Board.
13 Much like a protest at the Franchise Tax Board, the
14 Board is acting as an administrator.

15 The conservative view that we had -- I call it
16 conservative because of course there are other people
17 who had the other view and we were more conservative in
18 our views -- was that from a State bar prospective, as
19 lawyers, that without a specific rule allowing ex parte
20 or allowing the contact of a Board member outside the
21 context of a hearing, that as lawyers we potentially had
22 an ethical problem.

23 That lawyer problem did not apply to taxpayers
24 themselves, did not apply to an accountant or any other
25 type of professional who was not a member of the State

1 bar. That was our -- that was our view in practice with
2 respect to appeals from the Franchise Tax Board, because
3 those were quasi-judicial functions, not all the other
4 types of things that the Board might hear, including
5 sales tax disputes that the taxpayer had with the Board.

6 And when the rules of practice -- Joe, you
7 remember a long time ago when these were first done,
8 there actually was going to be a provision in the rule
9 about -- that would specifically allow that, and we were
10 kind of like oh, yeah, now, we don't have to be, you
11 know, the conservative people, taking the conservative
12 stance, because that's what we thought we needed, having
13 looked at it, to do it.

14 And the Board didn't put it in because in
15 committee someone said, hey, we're elected officials, we
16 can always meet, we don't need this.

17 And we sort of went, oh, man.

18 So there's that sort of general background and
19 history on the rule. And the Franchise Tax Board
20 counsel, you know, not just the current counsel but
21 long, long standing, also held that more, you know,
22 conservative view of everything from them. It's
23 a -- it's a quasi-judicial function and that the State
24 bar rules gave them a problem.

25 So my understanding of trying to put this, the

1 part of having this in, was that it gave that comfort,
2 would give that comfort level to any lawyer who took a
3 more conservative view. And I haven't done the research
4 more recently to see if there's been any changes, and to
5 the extent FTB had an issue, under the State bar rules,
6 that having an actual rule would give them a comfort.
7 They obviously had other issues with the whole concept.

8 MS. RUWART: Other -- yes.

9 MR. GOLDBERG: I had another comment.

10 MS. YEE: Just a general comment, as a sitting
11 member of this Board. I think we should be moving in a
12 direction of where there is as much openness as possible
13 in our proceedings leading up to the Board hearings.

14 And I really appreciate the Franchise Tax
15 Board's alternative to what's being promoted in that
16 experience with respect to involving their
17 participation, as we have these types of ex parte
18 communications, kind of putting the issue that Lenny
19 raised in terms of additional times and the issue of
20 whether there ought to be disclosure or not about
21 communication, I think certainly, as a member of this
22 Board, and I'm just speaking for myself, I find a
23 significant need to have as much information and
24 accessibility to information as possible prior to
25 hearing a matter.

1 And that's really from all sides. And I'm
2 actually quite disturbed by the fact that there is a
3 wall right now between the members and the Franchise Tax
4 Board with respect to their ability to participate with
5 us.

6 So I do appreciate that second alternative.
7 And would hope that we would be moving in the direction
8 of more open communications. And with the issues of
9 hearing time, additional hearing time and disclosure
10 issues set aside, I really have to think about it in
11 that spirit, that our proceedings should be as open and
12 as inclusive as possible.

13 MS. RUWART: Yes.

14 MR. GOLDBERG: Just a comment.

15 MS. RUWART: And your name for the court
16 reporter?

17 MR. GOLDBERG: Oh, Lenny, Lenny Goldberg.

18 In terms of Marcy's point, a Board member may
19 be more conservative in the sense that in a -- and I
20 think we can all use the word "quasi-judicial role" may
21 decide not to meet with anyone. The phrasing of this
22 language actually you could put a -- it says "shall
23 remain accessible." It then says "may," "others may
24 contact Board members."

25 If a Board member were to say, "I will only

1 meet with both parties at the same time," or "I may," "I
2 will only -- I will not meet with any of the parties
3 because I consider my role as quasi-judicial and
4 therefore will not meet," it may be that that first
5 sentence of 5015.1 -- I mean, a Board member obviously
6 can say, "I'm not going to meet with you."

7 But I just wonder if it puts an affirmative
8 obligation as a "shall" to, if a Board member were to
9 decide I'm not going to meet with any parties except
10 when both are in chambers, so to speak, at the same
11 time.

12 And I would suggest -- and I suggested that it
13 say, "Except for adjudicatory matters" at the end of
14 that sentence -- that there may be an obligation put on
15 a Board member that's inappropriate.

16 MS. RUWART: Very good. Did you have
17 a -- anybody, more comments on this? Yes.

18 MR. VINATIERI: Carole, Joe Vinatieri.

19 Some of us go back quite a ways, and we
20 remember a time when there were Board members who did
21 not meet with anybody. And I remember one Board member
22 in particular, Mr. Bennette, who was of the view that he
23 was sitting as a judge and therefore he would not meet
24 with people . That was his prerogative.

25 I also remember that the other Board members at

1 the time felt quite strongly diametrically opposed to
2 that position because they felt that they were elected.
3 And as, Betty, you've indicated, they were very
4 interested in getting as much information as possible.

5 There were concerns at that time about the
6 objectivity of the appeals process on, for example, on
7 business tax cases where the auditor would actually sign
8 off on the D & Rs that were provided after it had gone
9 to an allegedly objective hearing officer. It was a
10 different time.

11 Fast forward to today. The situation still
12 nonetheless remains that California is the only State in
13 the United States of America that has an elected revenue
14 agency. And that is a positive as far as many, many
15 taxpayers are concerned, because they at least have a
16 perception that they have an opportunity to talk to
17 somebody, which is not the case in most other states.
18 In fact, most other states are very, very formalistic,
19 and you go through the process and it leaves one wanting
20 in terms of minimal administrative due process. So
21 that's a hallmark of California's process.

22 And I would -- I would indicate that any -- any
23 change to try to put parameters on that would be to do
24 away with something that makes California a leader, at
25 least as far as this issue is concerned.

1 These Board members have constituents.
2 Constituents have a right to speak to whoever their
3 elected representative is, whether it be a Board member,
4 whether it be a member of the State legislature, whether
5 it be a County assessor. And that's embedded in the
6 California constitution.

7 And I would go so far to say that any provision
8 regulatorywise to prohibit or to stop that in any way,
9 shape, or form, might run afoul of an elected Board
10 member's responsibilities under the constitution of the
11 State of California.

12 So if you heard a bit of angst in my voice,
13 some of us have been around a long time, and we've seen
14 a lot of things happen around here. This is one of the
15 positive things at the State Board of Equalization, and
16 we should never forget it and never move away from it.

17 MS. RUWART: Lenny.

18 MR. GOLDBERG: Lenny again.

19 I guess that raises the question as the
20 alternative proposal by the Franchise Tax Board, which
21 is to require disclosure of the content of the
22 discussion, the time, the people involved, as the Public
23 Utilities Commission does right now, whether or not that
24 would violate that blanket statement that, well, they
25 can talk to whoever they want and in whatever form they

1 want. I do think we are using the term "quasi-judicial"
2 and then a disclosure becomes at least the "quasi" part
3 of the judicial, so to speak, but it does -- or the
4 judicial part of the quasi-judicial. But in any case,
5 it certainly doesn't interfere with anyone's right to
6 talk to an elected official, to have some requirements
7 for disclosure.

8 MS. RUWART: Are there any other comments or
9 discussions?

10 MR. LoFASO: Al LoFaso. I just want to make
11 one. I used to work at the Public Utilities Commission.
12 I just want to make one point about the Public Utilities
13 Commission and its process on the issue of openness.
14 The relationship of the staff work and, well, the PUC,
15 the Commission, is a little bit different because they
16 have different cases and they have an assigned
17 commissioner who is very involved in the case from the
18 very beginning and spends a lot of time in an
19 administrative law judge supervised hearing room, and
20 that role of the commissioner served as a conduit of
21 information to other commissioners.

22 So just on the issue of how information flows
23 to commissioners, there are a lot of earlier processes
24 at the PUC that don't quite jibe with all of the stuff
25 we're talking about.

1 Just a cautionary note about comparing and
2 contrasting.

3 MR. GOLDBERG: Lenny again.

4 All of this is on the record, and, secondly,
5 the ALJ, when I have tried to speak in an ex parte
6 manner to ALJs at the commission, they have said the
7 ALJs themselves have a blanket -- in a quasi-judicial
8 proceeding have a blanket agreement that they will not
9 have ex parte communications with any particular --

10 MR. LoFASO: I'm just talking about
11 commissioners in the hearing room and your earlier
12 points focusing on the process.

13 MS. ARMENTA-ROBERTS: Joan Armenta-Roberts.

14 Since the issue seems to be more with the
15 Franchise Tax Board hearings, couldn't you have
16 different rules that -- if you're going to change this,
17 couldn't you make it different for sales and use tax or
18 the other areas that don't have an issue.

19 MS. RUWART: It's an interesting suggestion
20 that I personally haven't heard, so . . .

21 MS. ARMENTA-ROBERTS: If you're going to change
22 it and make it that you have to have both, the Franchise
23 Tax Board has to be there --

24 MR. LANGSTON: That's what the Chief Counsel
25 Franchise Tax Board is proposing, that it only apply to

1 franchise and income tax.

2 MR. HELLER: Just a quick response before we go
3 to the next comments. It's just that there's no -- as
4 we said before, there's no statute governing this issue
5 right now, so there's nothing that would prohibit us
6 from doing that. We just need to have some rational
7 basis for treating the different programs differently,
8 so that's --

9 MS. MANDEL: The Board wears different hats.

10 MR. HELLER: That's correct.

11 MR. KAMP: I was going to say that the concerns
12 expressed in the FTB opinion relate to the State Bar
13 procedures. If you've got an attorney representing a
14 sales tax appellant or party, they may have the same
15 issues. But again, I think a rule that covers the
16 situation will take care of the State Bar concerns.

17 MS. MANDEL: Yeah. They shouldn't -- they
18 shouldn't have the same issue, for the reasons that I
19 stated earlier --

20 MR. KAMP: Yeah.

21 MS. MANDEL: -- that the Board is not really
22 hearing appeals, even though somebody decided a couple
23 of years ago to denominate it as appeals on our -- on
24 our agenda. The Board is acting as the administrator of
25 the tax.

1 But again, if you had a simple provision -- I
2 think what Joan's comment went to was the more specific
3 alternative that Franchise Tax Board is suggesting, that
4 that might not be necessarily applicable from her
5 viewpoint in the business tax basis.

6 MS. RUWART: That was Steve Kamp making that
7 comment.

8 MR. DAKESSIAN: Marty Dakessian. Well, I have
9 a couple of issues with even thinking about calling it
10 ex parte in some ways is incorrect, in my view, because
11 you have at least two of the five members of the
12 Board of Equalization that also sit on the Franchise Tax
13 Board. So are we going to talk about limiting
14 communications to those members who don't sit on the
15 Franchise Tax Board? Because really, you know, they're
16 interlocking Boards, and, you know, they oversee the
17 Franchise Tax Board. So how is that in any way, shape
18 or form ex parte?

19 Second of all, I mean, just getting back to the
20 issues that Joe was talking about earlier, which is
21 access to elected officials, access for the taxpayer,
22 for the small and medium-sized taxpayers, this is
23 critical.

24 I mean, I don't really see a distinction
25 between -- I understand the distinction that some are

1 making between the two different agencies, but certainly
2 from, you know, we're looking at it from a State Bar
3 perspective, we're looking at, you know, if we're
4 looking at the ethical concerns that others have raised,
5 there is no distinction.

6 Board members are not judges or judicial
7 officers. There is nothing out there that even remotely
8 suggests otherwise. And to try and, you know, reach and
9 create -- I understand, you know, there's some people
10 that hold the conservative view, but in my view there
11 might even be a competing ethical duty if we're going to
12 be governed by the State Bar rules, which is the duty to
13 zealously represent your client. There is no rule
14 prohibiting ex parte communications. And, you know,
15 maybe a lawyer needs to meet with Board members under
16 the State Bar rules.

17 But again, we're not judges or judicial
18 officers. The opinion issued by the State Bar relates
19 to administrative agencies under the APA. I mean, how
20 many leaps are we going to take in terms of making that
21 argument?

22 MS. RUWART: Okay. Yes.

23 MR. VINATIERI: Joe again. And I just want
24 to -- I would strongly advise not against making a
25 dichotomy between FTB matters and every other matter.

1 Once again, it's an issue of constituents being elected.

2 I remember when the circular came down back in
3 the '80s about the prohibition of the FTB talking with
4 the Board. I remember at that time I thought to myself,
5 why not? Why doesn't the FTB talk with Board members?

6 If the Board members are open to getting as
7 much information as they can, then the Board members --
8 we need to trust them that they'll listen to everybody
9 and they'll get all sides.

10 And I hate to say this, but there is an
11 underlying theme going on here that somehow, by talking
12 with Board members, that there's something improper
13 going on.

14 And I think, as Betty's indicated, it's a
15 matter of openness. It's a matter of information.

16 And I think everyone, to the extent that a
17 Board member so chooses to talk with people, that
18 everyone should have that opportunity, once again
19 understanding that our system is different than anyplace
20 else in the United States of America.

21 And I would strongly advise the Franchise Tax
22 Board that, to the extent that they are -- their
23 prohibition is predicated on this advisory opinion or on
24 some other ethical concern, that I would strongly
25 encourage them to revisit their opinion and avail

1 themselves of the opportunity to talk with Board
2 members, because the more information, the better. And
3 there's nothing unseemly taking place.

4 That's the underlying theme here, and that
5 bothers me greatly, because it's saying that your
6 elected Board members are somehow not doing things the
7 way they should be. And that's certainly not been my
8 experience over the many years that I've been involved
9 in this, doing matters in front of this agency.

10 MS. RUWART: Yes.

11 MS. ARMENTA-ROBERTS: Joan Armenta-Roberts.

12 In the end, Board members are going to vote on
13 it. Is there going to be an alternative for these
14 because there's controversy there and they're going to
15 have to make a choice? Is that -- or is this going to
16 be -- is this yes or no.

17 MR. HELLER: As of right now, this is the
18 Board's current policy, and we're -- this proposal is
19 intended to go before them for a vote of yes or no.
20 There is no competing proposal at this time. We haven't
21 received one in a format that's ready to be given to the
22 Board.

23 MS. MANDEL: Then you need to explain to the
24 Franchise Tax Board, which kind of has an alternative
25 suggestion -- remember, they're the one group that never

1 has participated in our kind of interested parties
2 process -- how, if they want the Board to vote on their
3 proposal, that they would submit it in what form?

4 MR. HELLER: Absolutely. Everyone here is --

5 MS. MANDEL: Or anyone else.

6 MR. HELLER: Every interested party, including
7 staff of both of our agencies, are entitled to submit
8 written comments or contact me personally by phone if
9 they'd like, or e-mail, with any comments they have on
10 any of the proposals that we're submitting for any of
11 the parts, including this proposal for communications
12 with Board members.

13 And to the extent that we're trying to have
14 something that's an actual competing alternative
15 proposal, the more that it can be developed, the better,
16 since staff is under time constraints. And really, the
17 more guidance and more input we get, the better.

18 But essentially to this point we did not -- we
19 received some tangential ideas about what certain people
20 would like or wouldn't like, but in general we've
21 received -- most of the comments we've received prior to
22 the last week or so were essentially yes, there should
23 be a rule, no, there shouldn't be a rule. Not there was
24 a middle ground. It's only in the last week or so that
25 a middle ground started to develop at all, although I'm

1 not clear that it's entirely there. And so there's --
2 that's why there has not been an alternative proposal to
3 this point.

4 MS. MANDEL: Okay. Getting back to Joe's thing
5 of this morning, of the timing, after this meeting,
6 you're going to have a revised draft, a staff-revised
7 draft, and ultimately before the Board comes something
8 to vote on.

9 If somebody says -- if this provision doesn't
10 change at all, the revised draft, and someone says, I
11 want, you know, something else, this type of commentary,
12 what they would really be looking for is language --
13 alternative language that would be proposed; right?

14 MR. HELLER: Absolutely. That would be great.

15 MS. ARMENTA-ROBERTS: I wasn't trying to give
16 him a heads-up on this.

17 MS. MANDEL: It's for everybody. You know, the
18 Board is so used to dealing with people who are familiar
19 with our process, familiar with interested parties
20 meetings, and that does that.

21 And I don't think it's fair to people, whether
22 it's Franchise Tax Board or Lenny or anyone who comes in
23 here who doesn't participate all the time in our systems
24 who then does what they think is a comment and then they
25 wind up at the Board meeting, and the Board's, like, we

1 don't have anything to vote on, boom, boom, boom. And I
2 don't think that's fair. That's all. I'm just trying
3 to make that clear to everybody.

4 MS. ARMENTA-ROBERTS: This is Joan. Usually
5 there's alternatives when the Board decides. If there's
6 opposition, which is -- Joe, that's my fear is if it
7 comes out that the alternative is this or FTB's proposal
8 that says when you have a meeting with a Board member,
9 everybody has to be present, and the Board's leaning
10 that way, that shouldn't be the case for non-FTB
11 hearings, according to what -- you know, I'm not an
12 attorney, but from what Marcy said, it doesn't sound
13 like there was that much controversy with the sales tax
14 side.

15 MR. VINATIERI: If it were to go in that
16 direction.

17 MS. ARMENTA-ROBERTS: Right.

18 MR. VINATIERI: But what I'm saying, there's
19 over-arching policy reasons here, but making no
20 distinction among tax programs.

21 MS. ARMENTA-ROBERTS: I mean, I like this the
22 way it is. I like what staff presented, the way it is,
23 but . . .

24 MR. GOLDBERG: Marcy gave a fairly cogent,
25 rational basis for making a distinction between tax

1 programs, which is that the Board sits as the
2 administrator of the sales tax, business taxes program,
3 sits as adjudicator or a judge, so to speak, of cases
4 between the Franchise Tax Board and the
5 Board of Equalization, and, in fact, is the final
6 arbiter if they decide against it, with no right to go
7 to court after that. It's essentially the Supreme
8 Court, as far as the Franchise Tax Board is concerned,
9 if the case goes against the Franchise Tax Board.

10 MS. MANDEL: But, see, Lenny, that -- this is
11 Marcy -- that goes to making -- you know, there's a way
12 to make FTB comfortable that they can call me and talk
13 to me about a case or I can call them and talk to them
14 about a case, where right now it's, you know, go away,
15 don't want to hear from you. This provision that staff
16 is suggesting alleviates that issue.

17 The other things that you're -- you know,
18 you've raised a lot of other things, but just in terms
19 of an express statement in the rules that says it's
20 okay, don't worry, to the extent everything's based on
21 lawyers having a certain view of the State Bar rules,
22 this -- which is where, as I understand it, FTB's
23 problem originated -- this takes care of it. This says
24 this is our process and it's okay. They have a
25 different view, but that at least -- that takes care of

1 it.

2 MR. HELLER: All right. We're going to have
3 to -- basically, we're going to have to keep moving
4 forward so we can cover a lot more ground the rest of
5 today.

6 I do think we've definitely got a good feel for
7 most people's comments. And as we indicated before,
8 we'll be accepting both verbal and written comments
9 through next Friday, and all the information for
10 submitting comments or contacting me is all available on
11 our website.

12 And just to summarize what I think, to help
13 people, normally we don't -- you know, we're not -- it's
14 not a formal policy of the Board that everyone has to
15 submit a draft of their alternative regulation during an
16 interested parties process in order for us to consider
17 one. It's just due to time constraints and the fact
18 that staff wasn't aware of alternatives until quite
19 recently, that there may not be an alternative here.

20 And I just want to summarize for people who are
21 concerned with alternatives, my understanding so far is
22 essentially that the FTB, while they still oppose
23 allowing ex parte communications or communications with
24 Board members in general, they would -- if that was
25 permitted, they would like the FTB to be invited to the

1 communication or the meeting in advance of that meeting,
2 is my understanding from the written comments I
3 received.

4 MS. BORGMAN: We have presented alternative
5 language to have that provision or, in the absence of
6 the FTB, have the communication disclosed on the
7 website.

8 MR. HELLER: Okay. And then I think the
9 SEIU 1000 has also recommended that basically disclosure
10 on the record of the Board hearings, so I think
11 there's -- there seems to be a small bit of consensus at
12 least on a remedy to deal -- Sarah, you're looking at me
13 as if I might be misstating it. Okay.

14 But anyway, SEIU 1000 basically was just
15 suggesting -- they suggested a limited rule that would
16 prohibit communications in the last ten to 14 days
17 before a hearing and would require any communications
18 that take place be disclosed on the record.

19 So at least there's a small framework of people
20 who are considering possibly any suggestions for an
21 alternative provision, and there are things that staff
22 is considering now.

23 And real quickly, before I move forward and
24 start a presentation to introduce the next topic, I'll
25 let Sarah speak one more time.

1 MS. ZIMMERMAN: I just wanted to add that I did
2 submit the language as a draft for folks to see today
3 and before I'd seen a lot of the other proposals, so I
4 don't want it to stand as SEIU's final position on that
5 issue, but essentially that was coming into today and we
6 will submit final language on that.

7 MR. HELLER: Okay. Thank you.

8 MS. YEE: On that proposal, I guess at what
9 point do you kind of make a determination that there's
10 consensus to move forward on that? I would expect that
11 those issues all come before the Board for some sort
12 of --

13 MR. HELLER: Right. And how we go about making
14 the decision is, essentially we need to have enough
15 information together to create a clear regulation. It
16 could be a full proposal that could stand side by side
17 with the other one and feel that we can get that done in
18 a time period that it can go through the review process
19 to be presented to the Board and then make the notice
20 for the next round for the meeting on -- which is now
21 scheduled for January 31st.

22 And assuming that all those things can happen
23 and there's a legitimate proposal, we would not make
24 a -- just let it go forward. We wouldn't make a
25 determination on validity or whether it would be

1 supported or not, but --

2 MS. YEE: I guess I would make a request -- I
3 know this is fluid, but I think January 31st may be
4 pushing it. I would rather see some -- particularly
5 with Sarah's proposal, which I'm open to looking at, I
6 would like some analysis about, practically speaking,
7 how that would be implemented.

8 MR. HELLER: Absolutely. We will absolutely
9 take those comments into consideration. I think if
10 there's some way to get it done before so they can be
11 scheduled for the 31st, we'll definitely do that, so
12 then we can figure out what it is. There may be some --
13 what we can come up with as a clear alternative, and
14 then if there's some need to postpone it, then we'll
15 definitely look at doing that, assuming that's a viable
16 option. We'll want to have as clear a proposal as
17 possible before they make a decision.

18 There definitely hasn't been any effort on the
19 staff's position. You know, staff has not been trying
20 to move this program forward in any effort to curtail
21 comment or to prevent the Board members from looking at
22 things or, you know, limit our workload from having to
23 respond to questions or something like that. It's
24 really just been driven essentially by time frames that
25 are really outside of our control.

1 And I think, as kind of tangentially was
2 mentioned earlier on the side, there have been several
3 different competing bills that have been introduced in
4 the legislature during the session that do tangentially
5 reflect on the information the Board provides to the
6 public, what information -- or how taxpayers can
7 inter-relate with the Board members.

8 We are trying to produce a product that the
9 legislature can view in a timely fashion that takes up
10 those legislative issues. And we're trying to make sure
11 that we have full products for them to see so that
12 they're not moving and making decisions about how the
13 Board's going to conduct its business in the future on
14 just a limited set of information without a lot -- our
15 full input. So that's really been the driving force, to
16 the extent that, you know, we can make exceptions to get
17 more comments in, we're going to try to do that.

18 MS. YEE: This is Betty again. I would just
19 caution not to have our discussions here be driven by
20 what the legislature may or may not do. I think this
21 process is really valuable, and I'm glad that all the
22 parties are here actually trying to flesh out some of
23 these issues. But I would like to at least not be
24 shortchanging ourselves in terms of the time that's
25 required to really look into those proposals.

1 MS. PELLEGRINI: This is Debbie Pellegrini.

2 First of all, I'd like to let you know that the
3 cookies are complimentary. We're having our Board staff
4 party right now, and so they're complimentary of the
5 Board members and executives. And anytime anyone wants
6 any more brought around, I'm sure we can get another
7 tray.

8 The other thing is, our typical process that
9 most of you know from interested parties meetings will
10 be to take the comments and create them such that, okay,
11 the Board is recommending, the staff is recommending,
12 here are some alternatives that were presented, and then
13 that's what goes to the Board so that they can either
14 adopt what the staff is recommending or have the
15 opportunity to have a discussion about the alternatives.

16 MR. HELLER: Briefly, let me just finish
17 addressing the last comment. Essentially, yes, we will
18 go ahead and try to do whatever we can to look at our
19 schedule to see if there's some way to provide more time
20 for more comment on this and maybe move that date that
21 the Board will consider this issue so that we can try to
22 work out a consensus, if there is one to be had, and at
23 least provide one more additional alternative, if not
24 more, if there's more coming.

25 And let's go ahead and just finish the rest of